

STATE OF MICHIGAN  
COURT OF APPEALS

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BOLTON CONDUCTIVE SYSTEMS, L.L.C.,

Plaintiff/Counter-Defendant/Third-  
Party Defendant-Appellant,

v

JEFF TRAUBEN a/k/a JEFFREY TRAUBIN,

Defendant/Cross-Defendant,

and

1164 LADD INC.,

Defendant/Cross-Plaintiff/Counter-  
Plaintiff/Third-Party Defendant-  
Appellee,

and

FRIEDMAN REAL ESTATE GROUP, INC.,

Third-Party Plaintiff-Appellee.

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Before: Davis, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Plaintiff appeals by leave granted an order granting motions for summary disposition in favor of 1164 Ladd Inc (Ladd) and Friedman Real Estate Group Inc (Friedman), ordering plaintiff to pay a \$100,000 brokerage commission to Friedman, and denying plaintiff's motion to amend its complaint. We affirm in part, reverse in part, and remand.

This case concerns the proper interpretation of contractual terms, the details of which we will set forth *infra*. The background to this case begins with plaintiff leasing certain premises from Ladd pursuant to an agreement that included a "right of first refusal" provision, under which plaintiff could purchase the property in the event another party offered to purchase it. Ladd desired to sell the property, and on June 3, 2005, Ladd entered into an agreement with Friedman, a real estate broker, to pay Friedman a fixed \$110,000 commission if the property sold

for \$4,050,000. Later that month, Ladd entered into an agreement with defendant Trauben to sell the premises for \$4,050,000. That sale did not take place, and the purchase agreement was terminated. However, Ladd and Trauben continued to negotiate, and on April 5, 2006, they entered into a second purchase agreement for the sale of the property \$3,650,000. That second purchase agreement made references to a commission payment to the broker, but it did not specify the amount. On April 7, 2006, Ladd, but not Trauben, signed an addendum that, among other things, provided that “Purchaser pays Friedman Real estate Group Flat Fee of \$100,000.” On April 12, 2006, plaintiff notified Ladd in a letter that it “hereby exercises its right of first refusal[.]” The next day, on April 13, 2006, Trauben signed the aforementioned addendum to the purchase agreement. The parties commenced suit against each other; in proceedings below that were unappealed and are unrelated to the instant appeal, the trial court found that plaintiff had properly exercised its right of first refusal. Thus, plaintiff purchased the property.

However, relevant to this appeal, Friedman sought from the parties its \$100,000 brokerage commission, and the trial court found at that time it entered the above order that a genuine issue of material fact existed regarding which party was responsible for paying that commission. Friedman moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff, as the purchaser of the property, was obligated to pay the brokerage commission, but that if plaintiff refused to pay the commission, Ladd, as seller, was obligated to pay the commission. Plaintiff also moved for summary disposition under MCR 2.116(I)(2), arguing that the statute of frauds barred Friedman’s claim to recover a commission from either plaintiff or Ladd. The trial court granted defendant Friedman’s motion and ordered plaintiff to pay the \$100,000 brokerage commission to Friedman. The trial court subsequently denied plaintiff’s motion for reconsideration. Plaintiff also moved to amend its complaint to add additional claims against Ladd based on the theory that Ladd violated a duty to inform plaintiff of the addendum before plaintiff exercised its right of first refusal. The trial court denied that motion based on the compulsory joinder rules of MCR 2.203(A). We granted leave to appeal.

A trial court’s decision on a motion for summary disposition and a trial court’s interpretation of a contract are both reviewed de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition under MCR 2.116(C)(10) is appropriate if the evidence and any legitimate inferences therefrom, when viewed in the light most favorable to the nonmoving party, reveals no genuine factual question for trial. *Id.*, 567-568. An unambiguous contract provision must simply be enforced and applied as it is written. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200; 747 NW2d 811 (2008). Contracts must be construed to harmonize and give effect to all words and phrases to the extent practicable, but a provision is considered ambiguous if it irreconcilably conflicts with another provision or is susceptible to multiple interpretations. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469-469; 663 NW2d 447 (2003). A trial court’s decision whether to permit amendment of pleadings will not be reversed on appeal absent an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004).

Plaintiff’s arguments generally allege that none of the contracts or contractual provisions require it to pay a commission to Friedman. Although we ultimately conclude that plaintiff did not obligate itself to the particular brokerage commission at issue, we do not entirely agree that plaintiff has no responsibility of *any* sort to pay a brokerage commission.

As discussed, plaintiff's right of first refusal, which it validly and properly exercised according to the unappealed finding of the trial court, was found in its lease with Ladd. The provision specifically provided as follows:

At any time after the expiration of the Acceptance Period, provided that the Term of this Lease (or Option Period) has not expired or otherwise terminated in accordance with the terms of this Lease (and further provided that Tenant has not committed any default under the terms of this Lease), if Landlord receives an offer to purchase the Premises from a third party ("Third Party Offer"), Landlord shall provide Tenant with a copy of such Third Party Offer and Tenant shall have five (5) business days from the date such Third Party Offer is given to Tenant to elect to purchase Premises on the terms and conditions contained in the Third Party Offer. If, within such five (5) business day period, Tenant fails to notify Landlord in writing of Tenant's willingness to acquire the Premises pursuant to the terms of the Third Party Offer, Tenant shall be deemed to have waived its right of first refusal under this Paragraph 24.b., and Landlord may sell the Premises pursuant to the terms of the Third Party Offer. If Tenant provides written notice to Landlord within such five (5) business day period, Tenant shall purchase the Premises in accordance with and subject to the terms and conditions of the Third Party Offer.

The above language is plain, unambiguous, and subject to only one possible parsing: plaintiff's exercise of its right of first refusal must be "on the terms and conditions contained in the Third Party Offer" and "subject to the terms and conditions of the Third Party Offer." In other words, plaintiff could *only* step into the shoes of the third-party offeror – who in this case was Trauben. Plaintiff's exercise thereby bound it to whatever terms and conditions would have been imposed upon Trauben as the purchasing party, had plaintiff not exercised its right of first refusal.

Therefore, we must examine what the purchase agreement between Trauben and Ladd required. Paragraph 9.E. of the purchase agreement provided:

9. Closing Adjustments. The following shall be apportioned on the Closing Statement against sums due Seller at closing:

\* \* \*

E. Seller shall pay all brokerage commissions due in connection with the sale, pursuant to Section 15 hereof.

In turn, paragraph 15 of the purchase agreement provided:

Purchase [sic] hereby certifies, represents and warrants that it has retained the services of Friedman Real Estate. At Closing, Purchaser shall pay to Friedman Real Estate a brokerage commission as agreed upon by Purchaser and broker pursuant to a separate agreement. . . .

The purchase agreement is superficially ambiguous in that two different provisions appear to obligate different parties to pay the brokerage commission. However, even a casual reading of the contract as a whole reveals that the provision obligating "seller" is by its own plain language

subordinate to the provision requiring the purchaser to pay the brokerage agreement, “as agreed upon by Purchaser and broker pursuant to a separate agreement.”

Plaintiff’s exercise of its right to first refusal put itself into the shoes of the “purchaser” referred to in the purchase agreement above. Plaintiff therefore became obligated to “pay to Friedman Real Estate a brokerage agreement as agreed upon by [plaintiff] and [Friedman] pursuant to a separate agreement.” Again, we therefore disagree with plaintiff to the extent plaintiff contends it has *no* obligations regarding the brokerage fee.

However, plaintiff notes that under the statute of frauds, “[a]n agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate,” MCL 566.132(1)(e), “is void unless that agreement, contract, or promise . . . is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise[.]” “Some note or memorandum having substantial probative value in establishing the contract must exist; but its sufficiency in attaining the purpose of the statute [of frauds] depends in each case upon the setting in which it is found.” *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 368; 320 NW2d 836 (1982) (citation omitted). It appears that there is only one possible writing that could establish the particular \$100,000 brokerage commission at issue in this case: the addendum signed by Ladd prior to plaintiff’s exercise of its right of first refusal and signed by Trauben *after* plaintiff’s exercise of its right of first refusal.

We agree with plaintiff that the addendum fails to satisfy the statute of frauds here. The reason is simple: when Trauben signed the addendum, *Trauben was no longer the purchaser*. Plaintiff exercised its right of first refusal on April 12, 2006. At that time, plaintiff stepped into Trauben’s shoes and became the purchaser under the purchase agreement as it existed at that time. Although the addendum existed then, it had only been unilaterally signed by the seller, *not by the party to be charged*. On April 13, 2006, the “party to be charged” was plaintiff, not Trauben. Therefore, Trauben’s signature could not be an “authorized signature” that could satisfy MCL 566.132(1)(e). Only plaintiff’s signature on the addendum could make it a writing that would satisfy the statute of frauds.

In summary, we affirm the trial court’s finding that plaintiff is obligated to pay to Friedman a brokerage commission based on the sale of the premises at issue. However, we reverse the trial court’s finding that any writing satisfies the statute of frauds and binds plaintiff to pay a *particular* brokerage commission. The plain language of the purchase agreement provides that plaintiff will pay to Friedman a brokerage commission pursuant to an agreement between those two parties, but no such agreement presently exists. In light of our conclusion, we decline to consider any of the other issues raised on appeal, and we remand to the trial court for any further proceedings that may be required. We do not retain jurisdiction.

/s/ Alton T. Davis  
/s/ Kurtis T. Wilder